

**JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS**

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Report

TO: Members of the Judicial Council

FROM: Policy Coordination and Liaison Committee
Hon. Marvin R. Baxter, Chair
Civil and Small Claims Advisory Committee
Hon. Elihu M. Berle, Chair
Discovery Subcommittee
Hon. C. Robert Jameson, Chair
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DATE: October 25, 2004

SUBJECT: Civil Settlements: Written Acceptance of Offers (Code of Civ. Proc.,
section 998) (Action Required)

Issue Statement

Code of Civil Procedure section 998 requires that an offer to compromise be in writing. However, the statute does not have a parallel provision expressly stating that the acceptance must also be in writing. To avoid any confusion that may arise with oral acceptances, the statute should be amended to require that acceptance of a section 998 offer be in writing.

Recommendation

The Policy Coordination and Liaison Committee and the Civil and Small Claims Advisory Committee recommend that the Judicial Council sponsor legislation to amend section 998 of the Code of Civil Procedure to require that acceptances of offers be in writing.

The text of the proposed legislation is attached at page 4.

Rationale for Recommendation

In *Bias v. Wright* (2002) 103 Cal.App.4th 811, the Court of Appeal held that an offer under Code of Civil Procedure section 998 may be accepted orally, but only if the offer does not require another mode of acceptance and only if the offer is absolute and unequivocal. These oral acceptances of section 998 offers may pose significant problems.

As the court in *Bias* noted, Code of Civil Procedure section 998 was designed to encourage settlements of disputes through a straightforward and expedited procedure: section 998(b)(1) provides that upon receipt of an offer of proof and acceptance, the clerk of the court shall perform the task entering judgment according to the parties' agreement. This task is ministerial.

But when the filed proof of acceptance relates to an oral acceptance, the effectiveness of this mechanism is substantially weakened. In that situation, the clerk of the court must review the description of the acceptance in the proof of acceptance to determine whether it sufficiently describes an absolute, unqualified timely acceptance made in the correct mode. An opposing party may then contend that there actually was no oral agreement or that the oral acceptance and written proof of acceptance were not the same. (*Bias v. Wright*, 103 Cal.App.4th 811 at 819.)

In response to these concerns, the court in *Bias* urged the Legislature to revise section 998. It stated:

Because the trial court and a clerk are not authorized to adjudicate a dispute over the terms of section 998 agreements before entering judgment, the additional layer of review imposed by oral acceptance permits unnecessary controversy. In view of the importance of section 998 procedures and judgments in the practice of law and the problems posed by the present statute, *we urge the Legislature to revise the statute to expressly require that acceptance and proof of acceptance of a section 998 offer must be in writing*. In the meantime, we suggest that parties who serve offers under section 998 state in the offers that acceptances must be in writing. (*Id.*, emphasis added).

The Civil and Small Claims Advisory Committee found the Court of Appeal's argument for an amendment to section 998 persuasive. Requiring acceptances to be in writing will reduce uncertainty and eliminate unnecessary controversy.

Alternative Actions Considered

The statute could be left unchanged; however, it appears preferable to revise the statute as suggested by the Court of Appeal.

Comments From Interested Parties

This legislative proposal was circulated for public comment in spring 2004. Six comments were received. The commentators included attorneys, a court executive officer, a president of a local bar association, and a member of the Civil Justice Association of California. The commentators supported the proposal.

A chart summarizing the comments and the committee's responses is attached at pages 5–6.

Implementation Requirements and Costs

This legislation should reduce uncertainty and result in some decrease in appeals of ambiguous acceptances of section 998 settlement offers.

Attachments

Code of Civil Procedure section 998 would be amended, effective January 1, 2006, to read:

1 **§ 998**

2
3 (a) ***

4
5 (b) Not less than 10 days prior to commencement of trial or arbitration (as provided in
6 Section 1281 or 1295) of a dispute to be resolved by arbitration, any party may
7 serve an offer in writing upon any other party to the action to allow judgment to be
8 taken or an award to be entered in accordance with the terms and conditions stated
9 at that time. Any acceptance of the offer shall be in writing.

10
11 (1) If the offer is accepted, the offer with proof of acceptance shall be filed and
12 the clerk or the judge shall enter judgment accordingly. In the case of an
13 arbitration, the offer with proof of acceptance shall be filed with the arbitrator
14 or arbitrators who shall promptly render an award accordingly.

15
16 (2) If the offer is not accepted prior to trial or arbitration, within 30 days after it
17 is made, whichever occurs first, it shall be deemed withdrawn, and cannot be
18 given in evidence upon the trial or arbitration.

19
20 (3) For purposes of this subdivision, a trial or arbitration shall be deemed to be
21 actually commenced at the beginning of the opening statement of the plaintiff
22 or counsel, and if there is no opening statement, then at the time of the
23 administering of the oath or affirmation to the first witness, or the
24 introduction of any evidence.

25 (c) ***

**Requiring Written Acceptance of Settlement Offers
(amend Code of Civil Procedure, section 998)**

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
1.	Mr. Christopher Cole Attorney San Francisco, California	A	N	I support the proposed changes in the Code of Civil Procedure section 998 on acceptance rules and the proposed changes to use of denials of requests for admissions, and allowing discovery sanctions.	No response required.
2.	Ms. Mary Majich Davis Chief Deputy Executive Officer Superior Court of California County of San Bernardino San Bernardino, California	A	N	No comment.	No response required.
3.	Mr. Richard L. Haeussler Attorney Newport Beach, California	AM	N	I would suggest that the Judicial Council propose an optional form, which includes a 998 offer and acceptance format. The offer would include a box for an attachment, which includes any general conditions which the offer makes, and instructions, which say what can be accepted, as well as time frames.	The committee will consider this proposal.
4.	Ms. Kim Hubbard President Orange County Bar Association Irvine, California	A	Y	Agree with proposed changes.	No response required
5.	Mr. Stephen V. Love Executive Officer	A	N	I agree with the proposed changes. This will memorialize and clarify what we are already	The committee agreed.

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	Superior Court of California, County of San Diego San Diego, California			doing.	
6.	Laura B. Riddell Civil Justice Association of California Sacramento, California	A	Y	Requiring an acceptance of a Section 998 offer be in writing will avoid any confusion as to whether the offer was accepted.	The committee agreed.